[IN THE COURT OF APPEAL OF CEYLON]

1972 *Present :* Fernando, P., Sirimane, J., and Siva Supramaniam, J.

G. B. DE SILVA, Applicant, *and* E. L. SENANAYAKE and 2 others, Respondents

APPLICATION 22 OF 1972

Election Petition Appeals Nos. 6-8 of 1971—Kandy Electoral District

Parliamentary election—Election petition—Decision of Supreme Court on appeal—Appeal therefrom to Court of Appeal—Ceylon (Parliamentary Elections) Order in Council (Cap. 385), s. 82B (5)—Court of Appeal Act, No. 44 of 1971, s. 8 (1) (d)—" Civil cause or matter ".

An application does not lie to the Court of Appeal for leave to appeal against a decision of the Supreme Court in respect of an appeal from the judgment of an Election Judge in an election petition concerning a Parliamentary election.

An Election Judge (or the Supreme Court on Appeal) determining an election petition is not dealing with a civil cause or matter within the meaning of Section 8 (1) (*d*) of the Court of Appeal Act, No. 44 of 1971.

APPLICATION for leave to appeal from the judgment of the Supreme Court in Election Petition Appeals Nos. 6–8 of 1971—Kandy Electoral District.

S. K. Sangakkara, with *Nihal Singaravelu* and *L. Wijenaike*, for the applicant.

S. Sharvananda, with *K. Kanag-Iswaran*, for the respondents.

Cur. adv. vult.

May 2, 1972. FERNANDO, P.—

The petitioner who was the unsuccessful candidate for election as member of the House of Representatives for the Kandy Electoral District at the Parliamentary General Election held in May 1970 applied for leave to appeal to this Court against the decision of the Supreme Court allowing an appeal preferred to it by the respondent and reversing the determination of the election judge that the respondent's election was void.

Counsel for the respondent submitted *in limine* that the application was not competent. We inquired from applicant's counsel whether he could satisfy us on two points :—

(1) that an appeal was available to this Court notwithstanding Section 82B (5) of the Ceylon (Parliamentary Elections) Order in Council, according to which " the decision of the Supreme Court of any appeal shall be final and conclusive " and

(2) that the judgment sought to be appealed from was one given by the Supreme Court " in any civil cause or matter "—Section 8 (1) (*d*) of Act No. 44 of 1971.

Although we must record that applicant's counsel made a brave effort to get over what appeared to us to be the two insuperable obstacles in the way of the applicant succeeding in having his application entertained by us, we were, at the end of his argument, left wholly unconvinced that the application was one that could properly have been brought before us. Indeed, having regard to relevant earlier authorities, it was a matter for surprise to us that the application was lodged at all.

In *de Silva v. Attorney-General*[1] the Privy Council had observed that the peculiar nature of the jurisdiction to entertain election petitions demands that the question whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown should be answered in the negative. It has further observed that the dispute (over the validity of an election) concerns the rights and privileges of a legislative assembly, and " whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a tribunal established for that purpose, the subject matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to Her Majesty in Council ".

The Ceylon (Parliamentary Elections) Order in Council 1946, before it was first amended in 1948, contained no provision enabling an appeal to be preferred to any court from the decision of the election judge.

The election dispute in *de Silva's case* (*supra*) was therefore one which could not have been brought before the Supreme Court by way of appeal. It was an amendment of the Parliamentary Election Order in Council by Act No. 19 of 1948 that for the first time made provision for an appeal to the Supreme Court and that appeal itself was confined to a question of law. The amending Act made further provision that " the decision of the Supreme Court on any appeal shall be final and conclusive. "

The later case of *Senanayake v. Navaratne* [2] was one attempted to be taken to the Privy Council after the enactment of the 1948 amendment, and, of course, after a decision had been given by the Supreme Court

[1] *(1949) 50 N. L. R. at p. 483.* [2] *(1954) 56 N. L. R. at p. 5.*

on an appeal made to it. The Privy Council adverted to this fact in its judgment holding against the competency of an appeal when it said that "since *de Silva v. Attorney-General* was decided, the Ceylon Order in Council has been amended by allowing an appeal to the Supreme Court on questions of law, but their Lordships cannot regard that amendment as affecting the application to the present case of the principle laid down in the cases cited."

In both cases above referred to what had been invoked by the applicants was the jurisdiction of the Privy Council to grant special leave to appeal. The finality of the decisions of colonial courts, even if so expressed in the statutes of the respective colonies, did not affect what is referred to as "the undoubted right and authority of the Sovereign" to admit an appeal from any person aggrieved by a judgment. The Privy Council however had advised the Sovereign in these and certain earlier cases that this special prerogative power of the Sovereign be not exercised as there could never have been an intention to permit appeals to the Crown from decisions made in the exercise of "election" jurisdiction.

We must assume that the legislature was fully aware of the judgments which had proceeded on the basis that it was never the intention to attach to these election petitions the incidents of an appeal to the Crown. With that knowledge the legislature by a special amendment already referred to enacted that the decision of the Supreme Court on any appeal shall be final and conclusive.

The words of the Order in Council are emphatic enough; the expression "final" does not appear to admit of ambiguity. While that expression "final" may have sufficed, the repetitive expression "final and conclusive" admits of no argument. The matter ends with the making of the decision of the Supreme Court. In these circumstances we would have required express provision in the Court of Appeal Act of a contrary intention before we could seriously have considered that an appeal is now competent. The search for any such express provision in the Court of Appeal Act has been a profitless undertaking. Moreover, it is highly unlikely that the legislature would have thought it necessary, after all these years, to permit an appeal of a kind which could not have been presented even to H. M. in Council.

Learned Counsel for the applicant endeavoured also to show that an election petition is "a civil cause or matter". While such an election petition does raise questions as to what may appropriately be called a person's civic rights, what an election Judge (or the Supreme Court on appeal) is determining on an election petition are not civil causes or matters within the meaning of that expression in Section 8 (1) (*d*) of the Court of Appeal Act. Indeed the Privy Council has consistently quoted with approval the opinion of Lord Cairns in *Theberge v. Laudry*,[1] itself expressed in a Privy Council case, that the relevant Acts of Parliament are not Acts constituting or providing for the decision of

[1] (*1876*) *2 A. C. at p. 106.*

mere ordinary civil rights. Acceptance of that opinion is found in the circumstance that whenever attempts (abortive though they proved) were made in Ceylon election cases to invoke the jurisdiction of H. M. in Council, the procedure followed was not to attempt to obtain leave under the Appeals (Privy Council) Ordinance but to invoke the power of the Sovereign to grant special leave. The former procedure could have been resorted to only by parties to civil suits or actions. It is plain that an election judge (or the Supreme Court on Appeal) determining an election petition is not dealing with a civil cause or matter within the meaning of Section 8 (1) of Act No. 44 of 1971.

We have set out above shortly our reasons for the rejection of the application and our direction that the applicant do pay the costs of the respondents.

Application rejected.